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7 HOT JEWELRY AUCTIONS.COM d/b/a JEWELRY  
OVERSTOCK AUCTIONS and PARAMOUNT  
8 AUCTIONS

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11

12 MICHELE MAZUR, individually and for all  
others similarly situated,

13 Plaintiff,

14 vs.

15 EBAY, INC., HOT JEWELRY  
16 AUCTIONS.COM d/b/a JEWELRY  
OVERSTOCK AUCTIONS, HOT JEWELRY  
17 AUCTIONS.COM d/b/a PARAMOUNT  
AUCTIONS, and DOES 1-100, inclusive,

18 Defendants.  
19

Case No. C 07 3967 MHP

DEFENDANT HOT JEWELRY  
AUCTIONS.COM'S NOTICE OF MOTION  
AND MOTION TO STAY ACTION PENDING  
ARBITRATION AND MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT  
THEREOF

Date: December 17, 2007

Time: 2:00 p.m.

Ctrm: 15

Judge: Hon. Marilyn Hall Patel

20 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

21 **PLEASE TAKE NOTICE** that on Monday December 17, 2007, at 2:00 p.m., or as soon  
22 thereafter as the matter may be heard in the above-entitled court, located at 450 Golden Gate Ave.,  
23 San Francisco, CA 94102, Defendant Hot Jewelry Auctions.com d/b/a Jewelry Overstock  
24 Auctions and Paramount Auctions ("HJA") will, and does, hereby move the Court to stay further  
25 proceedings in this case pending arbitration pursuant to 9 U.S.C. § 3 on the ground that Plaintiff  
26 Michele Mazur and ("HJA") agreed in writing that the issues raised in this action, as to HJA,  
27 would be arbitrated and no other, nonarbitrable claims are raised as to HJA.  
28

1 This motion will be based on this Notice of Motion and Motion, the Memorandum of  
 2 Points and Authorities filed herewith, the Declaration of Cathy A. Hongola, the pleadings, records  
 3 and papers filed herein, and other and further oral and documentary evidence and legal  
 4 memoranda as may be presented at or by the hearing on said Motion.

### 5 **MEMORANDUM OF POINTS AND AUTHORITIES**

#### 6 **I. Introduction**

7 Plaintiff Michele Mazur ("Plaintiff") alleges that she was an eBay user who was the  
 8 winning bidder of jewelry sold at an auction held by Defendant Hot Jewelry Auctions.com d/b/a  
 9 Jewelry Overstock Auctions and Paramount Actions ("HJA"). Plaintiff participated in HJA's  
 10 jewelry auction on-line through co-defendant eBay's "eBay Live Auction" service. Plaintiff states  
 11 that she "spent a grand total of \$4,602.90 on HJA's jewelry." (Complaint, ¶ 9.) Apparently  
 12 dissatisfied with the amount she paid for her items, Plaintiff filed a complaint against HJA and  
 13 eBay alleging a number of related contract, tort and statutory claims. Specifically, each one of  
 14 Plaintiff's claims alleges HJA made misrepresentations regarding the nature of HJA's auction  
 15 services.

16 In order to participate in the eBay Live Auction conducted by HJA, Plaintiff expressly  
 17 accepted and agreed to HJA's Terms and Conditions. HJA's Terms and Conditions (the  
 18 "Agreement") contains a "Dispute Resolution" provision providing that if "a dispute" between  
 19 HJA and the Plaintiff arises and cannot be resolved informally, the parties agree to submit the  
 20 dispute to a third party who will render a final a binding decision. This binding and enforceable  
 21 provision amounts to "arbitration" under the Federal Arbitration Act and encompasses all of  
 22 Plaintiff's claims against HJA. On this basis, HJA requests this Court to stay the action pending  
 23 the outcome of arbitration.

#### 24 **II. There Is An Enforceable Agreement Between Plaintiff And HJA Which Requires The** 25 **Parties To Resolve Their Dispute Through Alternative Measures**

26 The Agreement between Plaintiff and HJA is valid and enforceable. No circumstances  
 27 exist to render it void or voidable. Indeed, Plaintiff herself does not seek to rescind or cancel the  
 28

1 Agreement, but rather affirms the Agreement by suing upon it in her Complaint. (Complaint,  
2 Count 19.)

3 Pursuant to the Agreement between HJA and Plaintiff, Plaintiff acknowledged that as a  
4 "Buyer" she was in "complete agreement with all Terms and Conditions of [the] auction sale" and  
5 that as a "prerequisite to participating" in an auction, Plaintiff was bound by the terms and  
6 conditions contained in the agreement. (Declaration of Stephen S. Walters, ¶ 2, Ex. A at p. 2)  
7 Included in the Agreement is the following "Dispute Resolution" provision:

8 Should a dispute occur between HJA and Buyer (the parties) that cannot be  
9 resolved, then the parties agree to the rules, regulations and procedures of the  
10 dispute resolution described below and agree to the following procedures for  
11 Resolution of the Dispute: If either party alleges that the other party is in  
12 default under this agreement, then the dispute or allegation shall be submitted  
13 for Binding Resolution to In-House Attorneys, P.C. in the City of Los  
14 Angeles, California. Each party shall simply present their own case (limited  
15 to a maximum of one hour for each party) to In-House Attorneys, P.C.,  
16 excluding witnesses, expert witnesses and attorneys. The parties agree and  
17 acknowledge that they are completely waiving their rights to have the dispute  
18 heard in a conventional manner including use of attorneys, arbitration,  
19 mediation and any civil court in California having jurisdiction over the  
20 dispute. Any award determined by In-House Attorneys, P.C. shall be binding  
21 and the prevailing party shall be awarded full reimbursement of its actual  
22 paid fees in connection with the dispute remedy listed herein. (*Id.*, Ex. A. at  
23 pp. 6-7.)

24 HJA and Plaintiff thus agreed to waive their rights to seek relief through the courts, and  
25 agreed instead to use the alternative rules provided by the Dispute Resolution provision pursuant  
26 to which Plaintiff is contractually required to submit her claims to a third-party, In-House  
27 Attorneys, P.C. In-House Attorneys, P.C. will then issue a final decision binding on the parties.  
28 HJA and Plaintiff, therefore, provided for and agreed upon terms to resolve any dispute between  
them.

### 29 **III. The Dispute Resolution Provision Is An Arbitration Clause Subject To the Federal 30 Arbitration Act**

31 The Dispute Resolution provision of the Agreement provides a mechanism for arbitration  
32 within the meaning of the Federal Arbitration Act ("FAA"). Pursuant to section two of the FAA:

33 A written provision in any... contract evidencing a transaction involving  
34 commerce to settle by arbitration a controversy hereafter arising out of such  
35 contract or transaction... shall be valid, irrevocable, and enforceable, save  
36 upon such grounds as exist at law or in equity for the revocation of any  
37 contract.

1 9 U.S.C. § 2. Section three of the FAA, 9 U.S.C. § 3, requires the Court to stay a court action  
 2 pending arbitration if the claims asserted in the action are referable to arbitration under a written  
 3 agreement between the parties. The FAA manifests a "liberal federal policy favoring arbitration  
 4 agreements." *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

5 "No magic words such as 'arbitrate' or binding arbitration' or 'final dispute resolution' are  
 6 needed to obtain the benefits of the [FAA]." *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205,  
 7 1208 (9th Cir. 1998). The "parties agree to arbitration under the FAA when they 'agree[] to  
 8 submit a dispute for a decision by a third party." *Id.* (quoting *AMF Inc. v. Brunswick Corp.*, 621  
 9 F.Supp. 456, 460 (E.D.N.Y. 1985)). To fall within the term "arbitration" parties must also,  
 10 however, "agree not to pursue litigation 'until the process is completed.'" *Wolsey*, 144 F.3d at  
 11 1208 (citing *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 350 (3d Cir. 1997)). Here, the parties  
 12 have agreed to submit their disputes to the binding decision of a third party, In-House Attorneys,  
 13 P.C., and agreed to waive their right to pursue litigation. The dispute resolution provision in the  
 14 Agreement thus falls within the scope of the FAA.

15 Further, the non-standard nature of the dispute resolution provision does not preclude its  
 16 enforcement. The FAA does not prevent "the enforcement of agreements to arbitrate under  
 17 different rules than those set forth in the Act itself... and parties are generally free to structure  
 18 their arbitration agreements as they see fit." *Volt Info. Sciences, Inc. v. Bd. of Trustees of the*  
 19 *Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989). For example, in *Wasył, Inv. v. First*  
 20 *Boston Corp.*, 813 F.2d 1579, 1580-81 (9th Cir. 1987), the parties agreed that if they could not  
 21 decide the fair market value of certain assets, "the fair market value shall be established by three  
 22 independent appraisers, one selected by the Optionee, one selected by the Optionor, and the third  
 23 chosen by the other two appraisers." The Ninth Circuit Court of Appeals held that this appraisal  
 24 process promoted the policy favoring arbitration, and called for "arbitration" of the dispute within  
 25 the meaning of the FAA. *Id.* at 1582.

26 As with the appraisal provisions in *Wasył*, the Dispute Resolution agreement between  
 27 Plaintiff and HJA provides for and promotes arbitration by requiring the parties to resolve their  
 28 disputes outside the courtroom, freeing up judicial resources and avoiding the expense and delay

1 of court proceedings. *See Trafalgar Shipping Co. v. Internat'l Mill Co.*, 401 F.2d 568, 572 (2d  
 2 Cir. 1968) (the policy of FAA is to eliminate expense and delay of extended court proceedings);  
 3 *Galt v. Libbey-Owens-Ford Glass Co.*, 376 F.2d 711, 714 (7th Cir. 1967) (the policy of FAA is to  
 4 promote arbitration in accordance of the intent of the parties and to ease court congestion). That  
 5 agreement must be enforced.

6 **IV. All Issues Raised In The Complaint As To HJA Are Covered By The Dispute**  
 7 **Resolution Agreement**

8 The Dispute Resolution provision requires the arbitration of disputes between "HJA and  
 9 Buyer (the parties) that cannot be resolved." It encompasses any claim related to the contractual  
 10 relations created by the use of HJA's services. Under the FAA, statutory and tort claims are  
 11 arbitrable under a broadly worded arbitration provision such as the one here. *See, e.g.*,  
 12 *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 239 (1987) (RICO claims);  
 13 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-29 (1985) (antitrust  
 14 claims); *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.7 (1984) (fraud, breach of fiduciary duty,  
 15 and violation of California's Franchise Investment statute). California cases also support this rule.  
 16 *See Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street*, 35 Cal.3d 312, 323  
 17 (1983) (clause requiring arbitration of "any dispute" arising under a lease covered claim of fraud  
 18 that arose from the contract dispute); *Izzy v. Mesquite Country Club*, 186 Cal.App.3d 1309, 1315-  
 19 16 (1986) (provision requiring arbitration of "any action... in connection with" the agreement  
 20 covered fraud). Moreover, "any doubts concerning the scope of arbitrable issues should be  
 21 resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

22 Here, all of Plaintiff's claims and legal theories against HJA are arbitrable because they  
 23 have their roots in the relationship between the parties that was created by the Agreement.  
 24 Plaintiff's breach of contract claim alleges that HJA made "representations that its auctions took  
 25 place on a live auction floor and that all auctions had a \$1 starting bid with no reserve" and that it  
 26 breached the contract by "holding auctions that took place entire [sic] offline and by engaging in  
 27 systematic shill bidding practices which effectively made the minimum bids in the auctions much  
 28 higher than \$1." (Complaint, ¶¶ 236, 239.) These allegations form the basis for all of Plaintiff's

1 fraud-based claims against HJA, (*see e.g.*, Complaint ¶¶ 172 – 176, 185, 191, 202 – 206, 220 –  
 2 224, 236, 260), her unjust enrichment claim (Complaint, ¶ 245), as well as her claim regarding  
 3 violations of Cal. Commercial Code § 2328 (Complaint, ¶ 214). Additionally, absent Plaintiff's  
 4 consent to the Dispute Resolution provision in the Agreement, Plaintiff would not have been  
 5 permitted to use HJA's services at all and thus would not have suffered any supposed harm by  
 6 HJA's alleged misrepresentations and deceptive practices. Thus, Plaintiff's claims, which are  
 7 based on and indisputably related to the Agreement, must be submitted to "arbitration" as provided  
 8 by the Dispute Resolution provision.

#### 9 **V. HJA Is Entitled To An Order Staying This Action**

10 Pursuant to 9 U.S.C. § 3, "[i]f any suit or proceeding be brought in any of the courts of the  
 11 United States upon any issue referable to arbitration" the Court "shall on application of one of the  
 12 parties stay the trial of the action until such arbitration has been had... ." HJA is entitled to the  
 13 stay if "the issues in a case are within the reach of the agreement. *See Hornbeck Offshore (1984)*  
 14 *Corp. v. Coastal Carriers Corp.*, 981 F.2d 752, 754 (5th Cir. 1993) ("If the issues in a case are  
 15 within the reach of the agreement, the district court has no discretion under section 3 to deny the  
 16 stay.") Because the issues in the case are within the reach of the Agreement the court should stay  
 17 this action pending arbitration.

#### 18 **VI. Conclusion**

19 For the foregoing reasons, HJA respectfully requests that the Court grant its motion to stay  
 20 the action pending arbitration.

21 Dated: October 26, 2007

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 MALLORY & NATSIS LLP  
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 CATHY A. HONGOLA

24 By: /s/ Stephen S. Walters

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 JEWELRY OVERSTOCK AUCTIONS and  
 PARAMOUNT AUCTIONS